No. 146.

Brief of Remley for D. E.

ARGUMENT OF DEFENDANT IN ERROR.

Filed Nov. 28, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

Office Supreme Court, U. S.
FILED
NOV 28 1896
JAMES H. McKENNEY,
Clerk

T. H. RHODES, Plaintiff in Error,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

THOMAS HEDGE, J. W. BLYTHE AND H. M. EICHER,
COUNSEL FOR PLAINTIFF IN ERROR.

MILTON REMLEY, ATTORNEY GENERAL,
COUNSEL FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

In addition to the facts stated in the statement of the case by the plaintiff in error, I would call attention to the further fact that the plaintiff in error is a resident of the State of Iowa. He was the agent of the Burlington & Northwestern Railroad Company at Brighton, Iowa. The said Burlington & Northwestern Railway Co. is a corporation incorporated under the laws of Iowa and operating a line of railway from Burlington, Iowa, to and through Brighton. All of the line of said railway is wholly within the State of Iowa.

The receipt and way bill, marked Exhibits "A" and "B" respectively, on page 4 of the transcript, which are called the contract for the transportation of the intoxicating liquors, were given by the Chicago, Burlington & Quincy Railroad, at Dallas, Illinois The box marked "groceries" containing the intoxicating liquors, was received at Burlington, Iowa, by the Burlington & Northwestern Railway Co., and by it transported from Burlington to the town of Brighton. The act of the plaintiff in error in carrying the intoxicating liquors from the car to the freight depot of the Burlington & Northwestern, at Brighton, knowing the same to be intoxicating liquors, was the offense for which he was convicted, it being in violation of the Iowa statute set out in the argument of plaintiff in error.

I do not understand the plaintiff in error to claim that the evidence was not sufficient to justify the conviction of the plaintiff in error if the law under which he was convicted is valid, nor indeed, can such a question be determined in this court.

ARGUMENT.

The real question involved in this case is the proper construction and effect to be given to the Act of Congress of August 8th, 1890, commonly known as the Wilson Bill. Other questions are discussed by the plaintiff in error, in regard to some of which there can be no controversy.

I will not controvert the proposition that intoxicating liquor is, under the rulings of this court and other courts, an article of commerce; nor will I discuss the question whether prior to the enactment

of the Wilson Bill, its importation into the state and sale therein in original packages was not protected by the interstate commerce clause of the Federal Constitution. These questions have been determined in Bowman vs. Chicago & Northwestern, 125 U. S, 485, and Leisy vs. Hardin, 135 U. S., 112.

It is not necessary for me to discuss the question whether or not a state, under the police powers reserved to the states, in the absence of any action on the part of Congress, may enact statutes which effect interstate commerce The later decisions of this court leave no room for doubt upon this question.

With reference to the facts involved in the case at bar, Congress has declared that "intoxicating liquors transported into any state or territory or remaining therein, for use, consumption, sale or storage, shall, upon arrival into such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as if such liquors had been produced in such state or territory." It, therefore, is useless to discuss a state of facts other than that involved in the case at bar.

It is unnecessary for me to discuss the question when the act of transportation terminated, or when it began, and for the purposes of this case I am willing to concede that it did not terminate until the package transported had been delivered at the warehouse or depot at Brighton, Iowa.

I do not understand the learned counsel of plaintiff in error to raise any question that the Iowa statute, Section 1553 of the Code of Iowa, is invalid or cannot be enforced against intoxicating liquors produced in the State of Iowa, and against persons engaged in transporting the same from point to point or place to place within the state.

If, then, the plaintiff in error is not amenable to this law, it is solely for the reason that the liquors which were transported by him were within the protection of the interstate commerce clause of the Federal Constitution.

The position taken by the plaintiff in error is in effect that the Act of Congress known as the Wilson Bill is inoperative and void because it attempts to delegate to the states the power to regulate the traffic in intoxicating liquors, which is the subject of interstate commerce.

It is said by counsel that "interstate commerce is within the exclusive jurisdiction of Congress and exempt from the local jurisdiction of the state. Every subject of it, equally with every other, is within this exclusive jurisdiction, and exempt from the local jurisdiction. It is only when it ceases to be a subject of commerce, that the local jurisdiction can control, and it does not cease to be a subject of commerce except as a commercial fact, and not the result of statutory enactment." Then is cited one sentence from the opinion of this court *in re* Rahrer, 140 U. S., 560, which is as follows: "It does not admit of argument that Congress can neither delegate its own powers or enlarge those of the states."

The very question which plaintiff in error presents, was presented to the court *in re* Rahrer. On page 561 of the opinion, it is said: "In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things, and that not only may intoxicating liquors be imported from one state into another without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate the result." Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any state, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the states did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress. * * * But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In doing so, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws * * * No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competence to do so.

The differences of opinion which have existed in this tribunal in many leading cases upon this subject, have arisen not from a denial

of the power of Congress when exercised, but upon the question of whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states.

We recall no decision giving color to the idea that when Congress acted, its action would be less potent than when it kept silent. The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The manner of that disposition brought into determination upon this record, involves no ground for adjudging the act of Congress inoperative and void."

Under Section 8 of Article 1 of the Constitution, which provides, among other things, "Congress shall have power to regulate commerce with foreign nations and among the several states and among the Indian tribes," it has been held that in matters which do not require, from the nature of the case, uniformity, where Congress fails to act, it is within the power of the state to enact statutes which may affect commerce with foreign nations and among the several states, as for instance, police regulations of harbors, etc.

In Pierce vs. New Hampshire, 5 How., 504, the view was understood to be expressed that in the absence of any law of Congress regulating interstate commerce or commerce with foreign nations, a law passed by the state, although it affected such commerce, would be upheld. Afterwards a different doctrine has obtained, viz., that the non-action of Congress in regard to interstate commerce is taken as an intention on the part of Congress that such matters shall be free and untrammeled. This doctrine has been frequently announced by this court.

Cases cited in Robbins vs. Shelby Taxing Dist., 120 U. S., 489.

In the County of Mobile vs. Kimball, 102 U. S., 691, 697, it is said, "The non-action of Congress in such cases with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free."

The regulation of interstate commerce being exclusively within the powers and jurisdiction of Congress, it is unquestionably within the

power of Congress to determine whether it shall be free, and if not free in every particular, in what particular it shall be, or in respect to what commodities of commerce it shall not be free and untrammeled. This doctrine is clearly announced *in re* Rahrer, 140 U. S., *supra*. It logically follows that Congress may declare that commerce in intoxicating liquors shall not be free and untrammeled, or to suppress it; that intoxicating liquors as a commodity, are not subject to interstate commerce in the sense that their transportation and sale shall be free, unrestricted and untrammeled by the police regulations of the states.

Under the repeated decisions of this court, no one will question that the restriction or prohibition of the traffic in intoxicating liquors within the state is in the valid exercise of the police powers of the state. It is only when the exercise of these police powers comes in conflict with the powers granted to Congress to regulate interstate commerce, that statutes of a state must yield.

In Bowman vs. C. N. W. Ry Co., 125 U. S., 465, 493, this court says, "It (the state) cannot without the consent of Congress, expressed or implied, regulate commerce between its people and those of other states of the Union in order to effect its ends, however desirable such a regulation might be."

In Brown vs. Houston, 114 U. S., 622, 630, it is said, "So long as Congress does not pass any law to regulate commerce among the several states it thereby indicates its will that that commerce shall be free and untrammeled, and any regulation of the subject by the states is repugnant to such freedom."

The Act of Congress of Aug. 8, 1890, (the Wilson bill) is an express declaration on the part of Congress that interstate commerce in intoxicating liquors shall not as against the wishes of the state be left free and untrammeled. We are left no longer to inference, because of non-action on the part of Congress, in regard to the congressional will. It is expressly stated. The will or consent of Congress is not to be learned from implication, but is expressly and plainly stated. That expressed is that intoxicating liquors shall not be forced upon the people of a state against the will of the state as expressed in its laws. It shall not on its arrival in the state "be exempt from local jurisdiction," but shall be subject thereto. This certainly is within the

competency of Congress. As said *in re* Rahrer, cited above, "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge."

In re Spickler, 43 Fed. Rep., 653, the learned Judge Shiras said, "The states are not authorized to declare when such importations shall become subject to state control, nor can the states in any manner change or affect the enactment made by Congress on that subject. Congress can at any time abrogate or change the enactment in question and it is clearly a constitutional exercise of the power conferred on Congress. It is apparent to every one that at some time, or upon the happening of some event, imported property loses that character, and becomes subject to the laws of the state; and it is for Congress, which possesses the power to regulate commerce, to define the time or event which shall have the effect of subjecting importations to state control, and this is what is done by the Wilson bill in regard to intoxicating liquors."

To the same effect is the opinion of Judge Caldwell *in re* Van Vleit, 43 Fed Rep., 761.

In State *ex rel* Bartlett vs. Frazier, 48 N. W. R., 343, the Supreme Court of North Dakota says, "It will suffice to state that we concur in the conclusions reached in the cases cited, and hold that the Wilson law is a valid enactment, and is not a delegation, but an exertion of the legislative power of Congress. Such legislation only indicates the time and event which determines when intoxicating liquor ceases to be an article of interstate commerce, and becomes mingled with the mass of property in the state, and thereby subject to state control."

This is a fair statement of the law deduced from the opinions of this court, and of various other courts. In view of this, we cannot concur with the conclusion of the learned counsel for plaintiff in error, that an article of commerce "does not cease to be a subject of commerce *except as a commercial fact*, and not as a result of statutory enactment." Every case in which the subject is involved holds that it is within the power of Congress to declare what articles shall be the subject of interstate commerce, and to make any and all regulations that to Congress may seem best.

II.

It is contended by the counsel for the plaintiff in error that "Congress will not permit the police powers of each state to take effect upon commerce or upon commerce between the states, because there can be no assurance that the operation of such laws would be uniform." I do not care to pursue the argument of counsel under this head to any extent. I think that what has been said is a sufficient answer to the theories which they have advanced. What is said in regard to the different methods in which the police power of the different states is exercised, prescribing different penalties in regard to the question of intoxicating liquors, might be, with equal force, said in regard to every subject that comes within the province of the states to legislate upon. The argument of counsel, if it has force in regard to this particular question, applies with equal force to every question upon which a state may legislate, or upon which different states may have different legislation. This would lead then, carried to its logical conclusion, to a total abrogation of the state organizations, and would argue in favor of a centralized government whose every law should be of uniform operation throughout the entire United States. This, of course, is contrary to the principles of our government. It is doubtful, indeed, whether a vast empire as our own, embracing different climates, diverse conditions of soil, occupations and characteristics of the people, would be best governed in all local matters by a central government. The present system in best suited to the conditions of America, and under this system, there must ever be a non-uniformity in the laws governing the local communities

The argument, however, seems to be based upon the theory that Congress delegates to the states the right to regulate commerce and to fix fines and penalties for the violation of its local enactments, by the passage of the Wilson law. This position is so thoroughly refuted by the opinion of this court *in re* Rahrer, 140 U. S., 560, that it is not necessary to further notice it.

III.

It is contended by the counsel for the plaintiff in error, that "the Act of Congress of August 10th, 1892, (the Wilson law) does not permit the police law of Iowa to operate upon that branch of interstate commerce which consists in transportation, or to avoid or im-

pair the contract of transportation." If it be conceded that it is within the police power of the state to regulate or prohibit the traffic in intoxicating liquors, then any law or provision of law which has for its object securing the ends sought by the legislature, is a legitimate exercise of the powers of the state. If it is true, as declared under the Act of Congress of August 8th, 1890, that intoxicating liquors, upon their arrival in a state, are subject to the laws of such state, then they become subject to *all the laws* of such state, and if the act of transportation of intoxicating liquors produced within the state is illegal, then the transportation of such liquors brought within the state from another state becomes equally illegal.

The real question is whether the state has power to prohibit common carriers within the state from transporting what is in law recognized as a contraband article, from one place to another. I do not think it will be seriously questioned that the power of the state is full and ample in its efforts to secure the suppression of the traffic in intoxicating liquors, to prohibit their transportation. Then when intoxicating liquor is brought within the state under the Wilson Law, it becomes subject to the same laws that liquor produced within the state is subject to.

The fact that the contract of transportation was made at Dallas, Illinois, outside of the state of Iowa, by the C. B. & Q. Railroad Company, does not change the law. A part of the transportation contract, upon the theory of the plaintiff in error, was to be performed in the state of Iowa. The parties to the contract knew that the performance of such contract would be a violation of the laws of the state of Iowa. They knew also that because of the Wilson law, such contract would not be protected by the interstate commerce clause of the Federal Constitution. Parties may not make a valid contract to violate the laws of the state. In this case, however, the Burlington & Northwestern Railroad, a citizen of the state of Iowa, and operating its road wholly within the state, cannot authorize the C. B & Q. Railroad Co. to make a contract for it in the state of Illinois, when its part thereof must be carried out wholly within the jurisdiction of the state of Iowa, and in violation of its laws.

With reference to such liquors and contracts made for their transportation, the Wilson law takes away the protection of their interstate commerce character upon their arrival within the limits of the

state of Iowa. It must be presumed that this was known to the parties at the time the contract was entered into. The Burlington Northwestern Railroad can claim no protection for itself, and hence cannot claim protection for its agent, who knew the character of the merchandise transported, and in aiding therein violated the laws of the state.

The distinction attempted to be drawn between the power of the state to regulate and prohibit the sale of the article after its arrival in the state, and its power to prevent the transportation thereof after its arrival in the state, is, in my judgment, unwarranted by the authorities and unsound in reason. No well-considered case has ever placed any restriction upon the powers of the state to prevent the transportation of different articles from place to place within the state. The power to regulate internal commerce is one that was never granted by the states to the government of the United States. It has full and complete power to regulate, control or prohibit the transportation of any article whatsoever, that the legislature may deem injurious to public health or against public policy to permit to be transported or sold. All of the decisions which relate to transportation of interstate commerce are based upon the theory that the transportation is a part of the commercial transaction. Commerce consists of barter and sale. As an auxilliary to this is the transportation of the article sold. The transportation from one state to another comes within the power of Congress to regulate, solely because it is an act in commerce. Congress has no power to regulate the transportation outside or independent of its association with commerce, which is, strictly speaking, barter and sale.

If, then, the subject of commerce is by the Act of Congress of 1890, placed without the protection of the Federal authority, and is subject to the police laws of the state, then transportation thereof as an incident of commerce, is also taken out of the protection of the interstate commerce clause of the constitution of the United States.

The learned counsel for plaintiff in error contend that the exemption from the operation of the laws and effect of such laws of a state does not begin until the articles transported from one state to another shall arrive at the destination within the state, or the point to which they were shipped; that the act of interstate transportation continues until it comes "to the end of the carry." They also assume that if

the construction which was given by the Supreme Court of Iowa to this law is maintained, that liquors passing through the state in the continuous passage therein between two states, are brought under the jurisdiction and operation of the laws of Iowa. In regard to the last proposition I will say that the phrase, "for use, consumption, sale or storage therein," is a description of the kinds of fermented, distilled or other liquors referred to in the act, and such liquors transported in the state for continuous passage across the state, and not for use, consumption, sale or storage within the state, are not by said Act of Congress, made subject to the operation and effect of the laws of the state. Such liquor passing through the state on the continuous journey from one state to the other, is still within the protection of the interstate commerce clause of the Constitution of the United States, for aught that appears in the Act of Congress of August 8th, 1890.

In regard to the intent of the Act of Congress as to the point of time when the interstate character of the article should cease, the construction given by the Supreme Court of the state of Iowa seems to be the only one which the language of the Act is capable of receiving. Take the phrase, "upon its arrival in such state or territory"; what does that mean? It does not mean "to the end of the carry." Congress might have said, "upon its arrival at the point of its destination in such state or territory," but it did not. It might have said, "upon its delivery to the consignee at the point to which it has been shipped," but such was not the language used. A passenger may arrive in the state, days and weeks before he reaches his objective point within the state. The language of the act clearly intended that such liquors, the moment they arrived within the territorial jurisdiction of the state, should be subject, in all respects, "to the same extent and in the same manner as though such liquids or liquors had been produced within such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

That this was the intention, is gathered not only from the statute and the evil to be corrected by the enactment thereof, but from the arguments in the Senate and House of Representatives, to which the counsel for plaintiff in error have referred us. It appears therefrom that is was the intention of Congress to divest intoxicating liquors of their interstate commercial character, and to make the same, subject

in all respects to the laws of the state or territory into which the same might be transported. The interpretation of the language, "upon its arrival in such state or territory," given by Judge Simonton *in re* Langford, 57 Fed. Rep., 570, does not appear to be sound. Its arrival in such state is far different from its arrival at the point of destination in such state. The analogies by which the conclusion was reached by the learned judge do not hold, because of the difference of the language used. But if we were to accept the interpretation of Judge Simonton, then the liquor in question, upon its arrival at Brighton, became subject to the operation and effect of the laws of the state, and the act of which the defendant was convicted was a violation of the police laws of the state, and under this interpretation, even he was not entitled to the protection of the Federal Constitution.

"It is the plea of the plaintiff in error, that his act was in the course of business between the states of Illinois and Iowa, and was, in its legal character, an act exclusively of national concern." A ready answer to this is that the will of Congress has been plainly expressed, that it is not a matter of national concern; that the freedom of commerce between the states, which is exclusively within the control of Congress, shall not continue free and untrammeled in regard intoxicating liquors against the wishes of the state. The act of August 8th, 1890, is a declaration by the highest legislative power of the nation that whoever imports intoxicating liquors into any state, upon their arrival in such state cannot claim therefor the protection of Federal authority, but is amenable to all the laws of such state.

In every aspect of the case it seems that the judgment of the Supreme Court of Iowa should be sustained.

MILTON REMLEY, Attorney General of Iowa,
For Defendant in Error.